United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

No. 74-2370

IN THE UNITED STATES

COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD and GEMMA BRAULT
(Plaintiffs-Appellants)

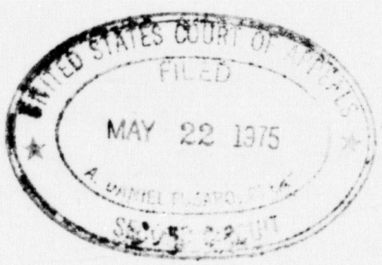
v.

TOWN OF MILTON
(Defendant-Appellee)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT

BRIEF OF APPELLEE

(Rehearing in Banc)



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STATEMENT OF ISSUES

Pursuant to the order of the Court dated April 17, 1975, this brief considers three issues:

I. The applicability of Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971), to violations of the fourteenth amendment due process rights.

II. The effect of 42 U.S.C. §1983 (1970) upon constitutionally based causes of action against municipalities.

III. The effect of the doctrine of claim preclusion upon this cause of action.

ARGUMENT

I. The holding in Bivens does not extend to violations of fourteenth amendment due process rights.

The decision of the Supreme Court in Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971), established for the first time since the founding of the Republic the federal common law right of an aggrieved person to sue for damages caused by a violation of the Fourth Amendment guarantee against unreasonable searches and seizures. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972). In the precise words of the majority, the court considered the question of whether violation of the command of the

Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct, and held that it does. Bivens, 403 U.S. at 389. Seldom is the court so explicit in stating its holding. The majority did not consider that it faced the question of whether all violations of constitutional guarantees give rise to consequent causes of action, and certainly did not answer that question affirmatively. It is submitted that the unusual care given to stating the holding underscores the limits of the Bivens decision.

That caution does not indicate that the Bivens rationale may never be extended to other areas of constitutional concern, only that such other areas be subjected to the same rigorous analysis underlying the Bivens decision. Appellee urges the court to carefully consider the special factors which were treated by the Supreme Court majority in Bivens. "An Agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." Id., at 392. Does a municipality seeking an injunction have a far greater capacity for harm than an individual civil litigant? Each must convince a neutral judge of irreparable injury, lack of adequate remedy at law, the probity of its claim on the merits, and similar requirements of law. The town, like any other plaintiff must respond to the exercise of a full panoply of due process rights afforded its defendant. If the mere institution of the civil action in Vermont's courts served to violate one or another of Appellants' rights, collateral federal relief was available. Cf., Mitchum v. Foster, 407 U.S. 225 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965).

State law was considered inappropriate to ensure effectuation of the Fourth Amendment's guarantees as the states may not undertake to limit the extent to which federal agents can exercise their authority. Bivens, supra at 395. In the instant case Vermont law fully controlled—within federal constitutional confines—the extent to which the Town of Milton could exercise its right to institute and maintain suit. It is therefore fully consonant with traditional notions of legal process that Vermont law should provide the remedy for wrongfully obtained injunctions. Indeed, Vermont law does provide its chancery courts with the power to remunerate for losses under an injunction because the right to remuneration is made a condition of the issuance of the injunction; this inherent power is based upon the principle that the party seeking the injunction has availed himself of the process of the court of chancery and must abide by its orders. In re Crescent Beach Ass'n., 126 Vt. 448, 236 A.2d 497 (1967). The interest protected by Vermont's laws regulating the issuance of injunctions and those protected by the Fourteenth Amendment's guarantee of due process of law are in no way inconsistent or hostile. Compare, Bivens, supra at 394. These considerations lead to Bivens' keystone, that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Id., at 392, quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (emphasis supplied). Is the implication of a damage remedy the necessary sine qua non of due process? It is clear that other protections have been afforded by state law. Although the Bivens court declined to accept the formulation of the question as whether the availability of money damages was necessary to enforce

the Fourth Amendment, it did so only because of the absence of explicit congressional declaration. Such is not the case here, as discussed in part two of the argument, infra. It is clear that the necessity of the particular relief was considered a factor in the Bell dicta quoted above and apparently relied on in Bivens.

This necessity factor may play a role in other Fourteenth Amendment claims which may from time to time surface in the courts. It may in the appropriate case warrant the implication of monetary damages. The question to be faced by the court must include consideration of whether such a far-reaching implication need be made in this case. It is respectfully suggested that the Circuit need only decide the instant case, and that it need not decide whether monetary damages may ever be implied directly from the Fourteenth Amendment. That this most important amendment to the Constitution might be interpreted in a discriminating and deliberate manner is hardly surprising. In determining compliance with equal protection requirements the courts look first to the nature of the right to see if "strict scrutiny" or "reasonableness" is to be applied. Compare Dandridge v. Williams, 397 U.S. 471 (1969), with Shapiro v. Thompson, 394 U.S. 618 (1969). In determining the extent of due process requirements courts consider the nature of the right being infringed. Compare Gideon v. Wainwright, 372 U.S. 335 (1963), with Morrissey v. Brewer, 408 U.S. 471 (1972). Indeed in determining the extent of "state action" the courts will even look to the nature of the alleged discrimination, for if it involves racial discrimination, the extent of the Fourteenth Amendment's scope will be greater. See, e.g., Bond v. Dentzer, 494 F.2d 302, 312 n.7 (2d Cir. 1974). Is it

therefore unreasonable to look upon the unplowed furrow containing seeds of monetary remuneration and decide that some will germinate and others not? Some alleged infringements, similar in nature to Mr. Bivens', may warrant the extraordinary invocation of monetary awards directly from the language of the Fourteenth Amendment, while others may not. It is suggested that the rights alleged to have been violated in the case sub judice are not such as to require such a remedy, while at the same time not foreclosing such possibility in other cases. Such future cases would seemingly be determined by the "necessity" analysis indicated by the Bivens holding in cases where there has been congressional declaration that certain plaintiffs may recover money damages.

The right of Mr. Bivens which was compromised is quintessentially one requiring monetary compensation. As the majority points out, what else is available? It is perhaps instructive to consider that the two cases in which the Supreme Court has faced the question of implying remedies directly from the Constitution, Bivens and Bell, both involved similar conduct by federal agents and the Fourth Amendment (although Bell also involved the Fifth). It does not put these sections of the Constitution on a higher plane, as suggested by Appellant, to imply remedies only from them. Rather, it may well be a necessary and reasonable corollary of the nature of those amendments that their enforcement requires monetary remuneration while other amendments may not. The nature of the First Amendment has required development of a doctrine of "prior restraint", that does not make it somehow more important than the Eighth or Thirteenth. Rather it only signifies that the nature of the rights afforded First

Amendment protection are such that prior restraint is almost never tolerated. So it is suggested that due process may require different modes of enforcement than search and seizure prohibitions, which modes need not necessarily include monetary damages. The denial of property without due process is not such an evanescent occurrence that meaningful protection must take place after the fact. Such denial can in fact be readily remedied by prospective relief in the majority of instances, the present included.

In determining the applicability of Bivens to Fourteenth Amendment due process violations, the court should first consider whether the Fourteenth Amendment provides a substantive basis for the claim presented. Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1537 (1972). Appellee, in pursuing its state court claim, afforded Appellants all the usages of civil process which are historically encompassed by the term due process. Groppi v. Leslie, 404 U.S. 496, 500 (1972); Davidson v. New Orleans, 96 U.S. 97 (1878). To say that merely by commencing an action Appellee "caused" Appellants to be deprived of their right to due process within the meaning of the Fourteenth Amendment would be a non sequitir. Whittington v. Johnston, 201 F.2d 810 (5th Cir. 1953), cert. denied 346 U.S. 867. That a state judge erroneously granted Appellee's request for relief similarly fails to amount to a denial of due process. The Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Stein v. New York, 346 U.S. 156 (1953); Gryger v. Burke, 334 U.S. 728 (1948). All that is required is that the parties be fully heard

in the regular course of judicial proceedings. Bonner v. Gorman 213 U.S. 86 (1909). The complaint makes clear that such a full hearing was afforded, to the vindication of the Appellants. It is thus clear that the Fourteenth Amendment does not provide a substantive basis for the claim presented, thereby rendering unnecessary the determination of whether this court has the power to infer remedies directly from the constitutional provision or what standard should be applied in setting that remedy. Dellinger, supra.

Bivens noted the absence of "special factors" counselling hesitation in the absence of affirmative action by Congress. Id., at 396. The case was essentially one of the internal workings of the federal government in which one branch disciplined another along traditional lines. The Fourteenth Amendment, however, involves the court in the exceedingly sensitive area of federal/state relations. It is therefore suggested that this area is a particularly appropriate one for restraint and deference to the judgment of Congress, the branch of government most closely bridging the gap between the states and the federal government. Cf., Developments, Congressional Power Under Section Five of the Fourteenth Amendment, 25 Stanford L. Rev. 885, 893 (1973).

II. The effect of 42 U.S.C. §1983 (1970) upon constitutionally based causes of action against municipalities.

Bivens was decided against a backdrop of "no special factors counselling hesitation in the absence of affirmative action by Congress...for we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." 403 U.S. at 396-397. The case here under consideration presents quite the opposite situation, for Congress has explicity declared that persons injured by municipalities' violation of the Fourteenth Amendment may not recover money damages from the municipalities. Monroe v. Pape, 365 U.S. 167, 191 (1961), interpreting 42 U.S.C. §1983. Hence this case is significantly distinguishable from Bivens and requires analysis beyond that contained in Bivens.

Section 1983 was enacted pursuant to the authority of Section 5 of the Fourteenth Amendment:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Monroe v. Pape, supra. Obviously, in not extending the right of recovery to persons damaged by municipal actions, Congress did not extend the scope of the remedy as far as it might have. However, a statute is not invalid under the Constitution because it might have gone further than it did, for reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Is the exclusion of municipalities from liability for their acts a violation of the Constitution for the first section of the Fourteenth Amendment provides for such liability?

Section one of the Amendment certainly is not clear in providing for one or another remedy. Rather it states a number of vital substantive rights which may not be abrogated by the states. By limiting the scope of §1983, Congress is not limiting the scope of due process, equal protection, or privileges and immunities; rather it is only limiting the enforcement of such rights. Section 5 gave Congress power to enforce but not to restrict, abrogate, or dilute the guarantees of section 1 of the Amendment. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). Even the dissent in Katzenbach defined Congress' power under section 5 as including the creation of remedies, as opposed to interpretation of the substantive reach of due process or equal protection. Appellee submits that §1983, as it applies to this case, is clearly within that Congressional area of authority as outlined in the Constitution. Leaving aside the question of whether the Town of Milton violated the Braults' right to due process of law, the remedy to be afforded them for such a violation is part of the "enforcement" of the Fourteenth Amendment, and therefore within the discretion of Congress. It is clear that Congress has chosen not to enforce against municipalities. While this was indeed a legislative compromise, such is not violative of due process. Arnett v. Kennedy, ___U.S.___ (1974). This does not leave the Braults without the protections of the Fourteenth Amendment, for they could have raised its prohibitions as a shield against any proceedings violating its proscriptions. However, in collateral enforcement, they are limited by the Constitution to remedies afforded by Congress. Cf., Preiser v. Rodriguez, 411

U.S. 475 (1973), holding that prisoners challenging the unconstitutionality of confinement must use the remedy of habeas corpus with the limitations placed thereon by Congress rather than a more convenient action under §1983. Should not Appellants in seeking to enforce the Fourteenth Amendment be similarly bound by Congressional limitations?

Appellants do not treat this issue, but rather shift the question from the effect of §1983 to the effect of 28 U.S.C. §1331 (1970). It is apparently their contention that so long as §1331 provides general federal question jurisdiction, and so long as the Constitution prohibits denial of due process by state instrumentalities, that the federal courts may grant any historically founded remedy for such denial. This would seem to hold that the requirement of exhaustion in habeas corpus actions, 28 U.S.C. §2254 (b) (1970), is similarly meaningless because a cause of action for release springs directly from the Constitution. Indeed, any Congressional limitation on substantive recovery or procedural requirements would seem to have been enacted in vain. Such a broad reading of §1331 or the Constitution would serve to so pull the general federal question out of the context of Congressional legislation as to distort its purpose and meaning, and to effectively deny Congress the power to compromise in its enactment of legislation governing the power of the federal courts. Appellee refers the court to the petition for rehearing for its views on the relationship of §1331 and §1983.

To hold that the federal courts may enforce the Fourteenth Amendment without regard to the limitations placed on them by Congress

would be to overrule the decision in Ex Parte Virginia, 100 U.S. 313 (1879), that the Amendment derives its force through section 5 and that the responsibility for enforcing the Amendment is placed not in the judiciary but in the Congress. Such a consideration was not present in Bivens, which correctly relied on Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in determining the remedy to be afforded by the federal courts to the victim of federal infringement upon constitutional rights. For these reasons it is submitted that the Bivens analysis is essentially irrelevant to the Fourteenth Amendment (although it may well be relevant to other portions of the Bill of Rights which might be infringed by federal officers) when Congress has taken explicit action and declared against recovery against the class of defendants of which Appellee is a member. Appellee respectfully suggests that although the panel majority which reversed the case at bar rejected the view that municipalities ought to enjoy a special status, Brault v. Town of Milton, Slip opinion at 1875, it was not free to so exercise discretion. Because of the very sensitive nature of federalism, the Constitution has entrusted such judgments to the Congress.

III. The doctrine of claim preclusion should be applied in this case.

The Vermont Supreme Court vacated the injunction of which the Appellants here complain, Town of Milton v. Brault, 129 Vt. 431, 282 A.2d 861 (1971), and made the following entry: Decree reversed and cause remanded for purposes of assessing damages pursuant to terms of injunction bond and 12 V.S.A. §4447. Section 4447 provides

> When an injunction has been dissolved by a final judgment in favor of the enjoined party, he shall be entitled to recover his actual damages caused by the wrongful issuing of the injunction.

This statute has been broadly interpreted, Spaulding v. Aetna Chemical Co., 98 Vt. 169, 172-75 126 A. 588 (1924), with the then plaintiff liable for any damage caused by the injunction unjustifiably given. Syskas v. Alvarez, 126 Vt. 420, 422, 234 A2d 343 (1967) (emphasis supplied). The choice of remedy for damages resulting from a wrongful injunction was the Appellants'. Couture v. Lowery, 122 Vt. 505, 508, 177 A.2d 371 (1962), and the duty to remunerate for such damages is a condition of the original issuance of an injunction. Houghton v. Grimes, 103 Vt. 54, 67-68 151 A.2d 642 (1930).

Recovery of injunction damages need not be limited to the amount of the bond in every case. Appellants did in fact seek to recover their full damages, although they chose the remedy of motion pursuant to the statute.

This choice of remedy may be of significance to this litigation, as some writer's have attached significance to the

question of whether the plaintiff in the §1983 action seeking collateral relief from a state court judgment was an involuntary litigant in state court, and was therefore somehow denied an opportunity to raise constitutional claims in federal court. See, Florida State Board of Dentistry v. Mack, cert. denied, 401 U.S. 960 (1971) (White, J. dissenting from denial of certiorari). It is clear that Appellants had a choice of forums when they sought the injunction damages which are clearly the basis for the instant action. They could have at that point instituted their §1983 claim in the District Court and litigated any state law claim in contract or under the statute through the doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hagans v. Levine, 415 U.S. 528 (1974).

The panel below, in holding Appellants not barred by res judicata from raising their constitutional claim in this action, relied on Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied ___U.S.___(1975), and Newman v. Board of Education, ___F.2d___, slip op. 1163 (2d Cir.), cert. denied ___U.S.___(1975). Appellee suggests that Newman is a per curiam following of Lombard and has no independent precedential value. The Lombard panel noted that it need not consider "the situation where no independent supplementary cause of action like an action under the Civil Rights Act is involved, and where the constitutional claim could have been adjudicated just as well by the state court." 502 F.2d at 637. Although the panel below found the instant claim to "plainly meet this description" of an independant supplementary cause of

action, it does not explain its conclusion. Brault v. Town of Milton, slip op. at 1870 n.5. A more reasonable reading of Lombard is that three specific tests must be applied to determine if normal claim preclusion is to be avoided in this action:

1) Is there an independent cause of action?

2) Is it supplementary within the meaning afforded that term in Lombard?

3) Could the constitutional claim have been adjudicated just as well by the state court?

Question 1 is treated in earlier parts of the argument. The second question, whether the cause of action here asserted is "supplementary", is difficult to respond to. That term is nowhere defined, and Appellee suggests that the Lombard decision carries the meaning of that term beyond what it held in Monroe v. Pape, 365 U.S. 167, 183 (1961). Certainly §1983 provides a cause of action independent of any state remedy, one which may be sought in addition to such remedy. But that does not carry with the implication that it may be litigated without regard to such state remedies or their adjudication. Were supplementary federal remedies to be uniformly afforded such independence of related claims, the entire doctrine of pendent jurisdiction would surely wither. Given the Supreme Court's statement that "...res judicata has been held to be fully applicable to a civil rights action brought under §1983," Preiser v. Rodriguez, 411 U.S. at 497, such actions must surely differ from other supplementary actions such as habeas corpus which are quite clearly excluded from application of claim preclusion. Fay v. Noia, 372 U.S. 391, 423 (1963). However, aside from the general nature of §1983, nothing in Bivens indicates that its cause of action arising

solely from the Constitution is in any way supplementary to remedies arising from state law. Indeed, it appears from the opinion that the holding is in large part based on the inappropriateness of forcing an alleged victim of federal official lawlessness to pursue his redress under a coordinate government which has no real authority over the actions of federal officers. Nothing in Bivens indicates that his cause of action is supplementary. Finally, there has been no discussion of whether the Braults could have had their constitutional claims adjudicated as well by Vermont's courts. As argued below, no reason appears to indicate that they could not.

Lombard has received serious and almost immediate criticism in academic comments, a medium generally predisposed to the expansion of federal civil rights jurisdiction. E.g., Note, 88 Harv. L. Rev. 453 (1974); Note, 43 Fordham L. Rev. 459 (1974). The Harvard note discusses a question not considered in Lombard--the apparent denial of full faith and credit to the prior state court determination. 88 Harv. L. Rev. at 455-459. Federal statutory law, 28 U.S.C. §1738 (1970), by requiring federal courts to give state judgments the same full faith and credit the judgments would be given in the jurisdiction of their rendition, obliges the federal courts to apply the rendering state's law of res judicata. St. John v. Wisconsin Employment Relations Board, 340 U.S. 411 (1951). The issue then must be framed in terms of whether the Braults could have brought the instant claim for denial of due process in Vermont's courts. Appellants apparently urge

that they could, under the statement that only issues "actually litigated" are barred from subsequent relitigation. Brief of Appellants, 13. This may be true for questions of collateral estoppel or issue preclusion, but is a patently incorrect statement of Vermont law with respect to claim preclusion, res judicata. Rather, the Vermont Supreme Court recently reaffirmed that parties to a judgment are concluded thereby, not only as to issues actually litigated, but also as to issues which might properly have been tried and determined in that action. B & E Corp., v. Bessery, 130 Vt. 597, 601, 298 A.2d 544 (1972). The B & E holding interestingly relies on a holding of Judge Redfield, who authored Gray v. Pingree, 17 Vt. 419 (1845), incorrectly relied on by Appellants. Gray dealt with facts actually litigated, not issues which could have been litigated. 17 Vt. at 425. The test in Vermont for determining whether a party has a single and entire cause of action, which must be sued for in one action, or has a severable demand and may maintain separate suits, depends on whether the entire claim arises from the same act or from distinct and different acts. Louden Machinery Co. v. Day, 104 Vt. 520, 524, 162 A.370 (1932). It is an inflexible rule that all damages resulting from an entire and indivisible cause of action must be assessed in one proceeding, Sabourin v. Woish 117 Vt. 94, 99-100, 85 A.2d 493 (1952). The form of action pursued is immaterial. Failure to choose an appropriate remedy to recover all the damages in the first action does not alter the rule. Id. Even when only nominal damages are recovered in an action, the judgment therein is a bar to any future action. Sabourin v. Woish

117 Vt. at 100. Other tests which the Vermont Supreme Court has applied include the question of whether the damages in both suits are resultant from the same act. Moultroup v. Gorham, 113 Vt. 317, 319, 34 A.2d 96 (1943). Could the relief sought in the second action have been fully obtained in the first? Woodbury Lumber Co., Inc. v. McIntosh, 125 Vt. 154, 155, 211 A.2d 240 (1965). No new cause of action is introduced by amendment where the plaintiff adheres to the contract originally declared upon, but merely alter the modes in which defendant has broken it. Curtis Funeral Home, Inc. v. Smith Lumber Co., Inc., 114 Vt. 150, 154, 40 A.2d 531 (1945). Could the issues presented in the present suit have been raised and determined in the former had plaintiff cared to rely thereon? Johnson v. Wells-Lamson Quarry Co., Inc., 103 Vt. 475, 480, 156 A. 681 (1931). A comparison of the Vermont Supreme Court decisions in Town of Milton v. Brault, supra, and the complaint in the instant case, Appendix 2-3, reveals that beyond doubt Appellants could not have brought this action in Vermont's courts, they being foreclosed by prior litigation. By affording a federal forum to in effect review the Vermont decision, this Court would be failing to accord Vermont's judgment the full faith and credit to which it is entitled.

Federal law would indicate the same test of claim preclusion, namely that the federal court may not even decide issues which could have been but were not submitted to a state court in prior litigation. Angel v. Bullington, 330 U.S. 183 (1947). Does any compelling reason appear to not apply this general rule in this litigation? Certainly the ruling in Preiser v. Rodriguez, supra while not specifically approving the application of res judicata to §1983 claims, indicates that such claims are

different from habeas corpus and are not to be used to ride roughshod over settled limitations on recovery which exist in other areas of the law.

Although Lombard suggests that federal constitutional claims are perhaps best litigated in federal courts, such courts do not have exclusive jurisdiction. Palmore v. United States, 411 U.S. 389, 401-402 (1973). In our federal system, the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states and state courts. Testa v. Katt, 330 U.S. 386, 391 (1947). It is further clear that state courts do have jurisdiction to hear claims under §1983. International Prisoner's Union v. Rizzo, 356 F.Supp. 806 (E.D.Pa. 1973). No reason appears to indicate that this claim, because it is only analogous to one brought under §1983 or because it is now founded directly and solely upon the Constitution, should be beyond the jurisdiction of Vermont's courts. Congress does have the power to vest exclusive jurisdiction in the federal courts over one or another federal claim, and has in fact done so. But it has not done so by 28 U.S.C. §1331 or by §1983. Is there any compelling reason for the federal courts to take it upon themselves to do so?

Neither do the federal courts have appellate jurisdiction to review the judgments of state courts. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Our federal system exists with two sovereign court systems, and it is necessary to avoid unnecessary conflicts. Each judicial system must protect federal constitutional rights, and the United State Supreme Court has the power to

ultimately pass on state decision involving such rights. Brown v. Allen, 344 U.S. 443, 456 (1953). Here Appellants never sought Supreme Court review, yet obviously seek to collaterally attack the judgment of the Vermont Supreme Court that Appellee is not liable beyond the amount of $500, which has admittedly been paid. Such collateral attack, particularly where only monetary damages are sought without prospective relief against ongoing violations of constitutional rights, is precisely the kind of action which will deny state court judgments the finality due them under federal law and lead to friction between members of the federal aystem. See, Vestal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla. L. Rev. 185, 200, 211 (1974). It should here be noted that Lombard and Newman both alleged ongoing violations in that they continued to be denied an opportunity to teach in the New York public school system. Appellants here are not seeking relief from any present activity of Appellant.

Appellant also notes that res judicata has been previously applied by this circuit to questions of procedural due process raised subsequent to state court litigation. Taylor v. New York City Transit Authority, 433 F.2d 665 (1970). Furthermore, there is no basis in law for placing procedural due process in an exalted position when other courts have applied res judicata principles in similar factual situations involving equally important constitutional rights. 43 Fordham L. Rev. at 463, and cases cited therein.

Appellee therefore urges that any claims of Appellants resulting from the issuance of an injunction by the Chittenden

County Court be held to have become merged in the final judgment of the Vermont Supreme Court, and that such judgment serve as a bar to future relitigation of claims of damages resulting from that injunction.

CONCLUSION

Bivens v. Six Unknown Named Agents does not stand for the proposition that any violation of the Constitution gives right to a cause of action for damages resting solely on that document. It is particularly inappropriate as support for a cause of action arising out of the Fourteenth Amendment which explicitly grants Congress enforcement powers for rights protected by that Amendment. Bivens further has no application to areas of the law where Congress has legislated specific remedies, including situations where the legislative process has resulted in the compromise of one or another possible remedy. This case is a particularly inappropriate case for the extention of Bivens in view of the nature of the rights alleged to have been violated, for to create a claim for damages would inevitably intimidate municipalities throughout the circuit in the exercise of their appropriate governmental duties. Finally, Appellants have had their "bite at the cherry" inseeking damages resulting from the mistaken issuance of an injunction. Although their theory of recovery has been changed, the recovery, not the theory, is the "cherry" and they should not be afforded a second opportunity in light of an ample state court remedy, and the opportunity before having pursued that remedy to have taken

their case to the federal court.

Submitted at Burlington, Vermont 21 May, 1975.

TOWN OF MILTON

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CERTIFICATE OF SERVICE

I, Matthew I. Katz, a member of the firm of Latham, Eastman, Schweyer & Tetzlaff hereby certify that I have served a copy of the foregoing instrument by mailing the same, first-class mail, postage prepaid to John Burgess, Esquire, Box 766, Montpelier, Vermont 05602 this 21st day of May, 1975.

_____

Matthew I. Katz